Supreme Court, U.S.
FILED
SEP 27 2004
OFFICE OF THE CLERK

No. 04 444

IN THE

# Supreme Court of the United States

MELITA PICCIOTTO AND ATHENA PICCIOTTO
*Petitioners,*

v.

MICHAEL C. GILLERAN AND OTHERS,

*Respondents.*

On Petition For Writ Of Certiorari
To The Supreme Judicial Court For
The Commonwealth Of Massachusetts

## PETITION FOR WRIT OF CERTIORARI

Melita Picciotto
Pro Se
418 Lafayette Street
Salem, MA 01970
(978) 741-021

Athena Picciotto
Pro Se
418 Lafayette Street
Salem, MA 01970
(978) 741-021

## QUESTIONS PRESENTED FOR REVIEW

This petition for writ of certiorari appeals the final judgment or decree of the Supreme Judicial Court of Massachusetts (SJC) denying the Petitioners further appellate review on lifting the lower court's injunction, and continued seizure of the Petitioners' property, for the benefit of private parties. A jury verdict January 6, 2002, and the trial court's entry of final judgment March 22, 2003, fixed and liquidated the amounts owed by the Petitioners. Therefore, the Petitioners state that the continued retention by the State of the Petitioners' property (settlement funds that were deposited with the court in 1999 to satisfy attorney liens), constitutes deprivation of property without due process of law. The petition for writ for certiorari also requests review of the failure of the Supreme Judicial Court of Massachusetts to be concerned by the lack of proper decorum and degenerating standards in the Massachusetts courts, while the courts are in session. The questions presented for review are:

1. Whether due process is violated if, after final judgment is entered by the trial court (which establishes and liquidates the amounts owed by the parties) the state courts can continue to deprive United States citizens of their property, above and beyond the sum needed to satisfy the judgement.

2. Whether the dignity and decorum of an American courtroom requires that the State must prohibit, rather than encourage, jurors to sit in the jury box

dressed in Halloween costumes and be passed candy and joke bumper stickers by the defendant's opposition.

3. Whether it is further permissible for a presiding state court judge to order the removal of the American flag from the courtroom during the proceedings and have the court in session without the American flag present, and while sworn testimony is provided to the jurors.

## PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are the Petitioners (Melita Picciotto and Athena Picciotto), and Michael C. Gilleran, Esq.; Gilleran & Mortenson, P.C.; Pepe & Hazard, LLP; Albert Zabin, Esq., Robert Costello, Esq., and Joanne D'Alcomo, Esq., Schneider, Reilly, Zabin & Costello, P.C.; Schneider, Reilly, LLP; Joel Eigerman, Esq.; Roche, Carens & DeGiacomo, P.C.; Edwin McCabe, Esq.; McCabe, Brown & Davis, P.C.; Edward Greer, Esq.; Judith Picciotto; Stefano Picciotto; Juan Nunez; Foreign Car Center, Inc.; George Richardson, Esq.; Warren Five Cents Savings Bank; and Travelers Indemnity Company.

## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDINGS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS INVOLVED ..... 3

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING WRIT ..... 10

CONCLUSION ..... 13

APPENDIX ..... a

## TABLE OF AUTHORITIES

CASES — Pages(s)


Federal Statutes
28 U.S.C. § 1257 ..... 1

Massachusetts Statutes
M.G.L. c. 93A § 11 ..... 4
M.G.L. c. 220, § 1 ..... 10
M.G.L. c. 231, § 117 ..... 9
Mass. R.A.P. 6 (a), as amended 378 Mass. 931 (1979) ..... 9

California cases
*Sandoval v. Superior Court*, 140 Cal. App. 3d 932, 936-937; 190 Cal. Rptr. 29 (1983) ..... 8

Florida Cases:
*In re Transworld Foods, Inc.*, 41 B.R., 363, Bankr. M.D. Fla. (1984) ..... 8

Illinois cases
*Jamie Lynn OTT, A Minor, by her Father and Next Friend, Mark Out et al., v. Little Company of Mary Hospital, et al.*, 273 Ill. App.3d 563, 652 N.E.2d 1051, 210 Ill. Dec. (1995) ..... 10

Maine Cases
*Bartlett* v. *Pullen*, 586 A.2d 1263, 1265 (Me. 1991) ..... 7

Massachusetts cases
*Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22; 21 Mass. App. 488 (1986) ..... 6
*In the Matter of Fordham*, 423 Mass. 481, 668 N.E. 2d 816, 825 (1996) ..... 6
*In re: Keenan*, 47 N.E.2d 12, 313 Mass. 186 (1943) ... 9
*Goodridge & others v. Department of Public Health & another*, 440 Mass. 309, 798 N.E. 2d 941 (2003) ..... 10
*King v. Grace*, 293 Mass. 244 (1936) ..... 2
*O'Brien v. Hanover Insurance Company*, 427 Mass. 194, 692 N.E.2d 39 (1998) ..... 7, 8

New Hampshire Cases
*Petition of Dono*van, 137 N.H. 78, 81623 Atl. 2d 1322 (1993) ..... 7

New York Cases
*In re Bogdanovich*, 292 F.3rd 104, 39 Bankkr Ct. Dec 1323 197, 2nd Cir. (N.Y.) (2002) ..... 8

United States Supreme Court Cases
*Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) ..... 10
*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) ..... 11

*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) ..... 2
*Firestone Tire & Rubber Co .v Risjord*, 449 U.S. 368 (1981) ..... 2
*Mooney v. Holohan*, 294 U.S. 103 (1935) ..... 2
*Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438 (1944) ..... 10

Federal Cases

*Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1985-1 Trade Cases P 66, 606, 9th Cir. (Cal.) (1985) ..... 8
*In re Levitt*, 18 B.R. 598, Bank.E.D. Pa. (1982) ..... 8
*In re Overmyer*, 32 B.R. 597, Bankr. S.D.N.Y. (1983) ..... 8
*Meade Land & Development Co., Inc.*, 1 B.R. 279, 5 Bankr. Ct. Dec 991, Bank.E.D. Pa. (1979) ..... 8
*McConnell v. Travelers Indemnity Co.*, 346 F.2d 219, 9 Fed. R. Serv.2d 1.3, 2, 5th Cir. (La.) (1965) ..... 8
*Robi v. Five Platters, Inc.*, 838 F.2d 318, 5 U.S.P.Q.2d 1709, 9th Cir. (Cal.) (1988) ..... 8
*Rivera Rodriques v. First Bank Puerto Rico*, 184 F. Supp.2d, D.Puerto Rico (2002) ..... 8
*Roman v. Estelle*, 917 F.2d 1505 (9th Cir. 1990) ..... 2
*Southern Pac. Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 1011, 1018-1019 (D.C. Cir. 1984) ..... 7

# PETITION FOR WRIT OF CERTIORARI

Petitioners Melita Picciotto and Athena Picciotto respectfully petition for a writ of certiorari to review the final judgment or decree of the Supreme Judicial Court of the Commonwealth of Massachusetts (SJC) in this case, which upheld the Appeals Court decisions by refusing to grant further appellate review.

## OPINIONS BELOW

The opinion of the SJC was not reported (App. a.). the opinions of the Appeals Court Panels were not reported (App. b and App. d). The opinion of the Single Justice of the Appeals Court was not reported App. f).

## JURISDICTION

### I. THE UNITED STATES SUPREME COURT HAS JURISDICTION.

28 U.S.C. § 1257 states in pertinent part:

> (a) Final judgments or decree rendered by the highest court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of it being repugnant to

the Constitution, treaties, or laws of the United States.

The denial of further appellate review by the Massachusetts SJC was entered June 30, 2004. Therefore, in seeking to have their property released to them, the Petitioners have exhausted their state court remedies. The Massachusetts SJC has been given fair opportunity to review the merits of the Petitioners' claim for purpose of exhaustion of state court remedies; *Roman v. Estelle*, 917 F.2d 1505 (9th Cir. 1990). This case involves the seizure of the Petitioners' property by the State[1] without due process of law. The issue of wrongful seizure and continued retention of the petitioners' entire settlement funds was first raised in the trial court pretrial. It was also raised in the trial court after the jury verdict was rendered. The issue of the violation of procedural due process by conducting a trial lacking the proper dignity and decorum was also first raised at the trial court and throughout the appeal. The single justice of the Appeals Court refused to grant the Petitioners any relief. The Appeals Court Panel refused to grant any relief, and the Supreme Judicial Court of Massachusetts refused to address it, or provide any further appellate review. It is therefore within the jurisdiction of this Court to issue a writ; *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, (1949), See also *Firestone Tire & Rubber Co .v Risjord*, 449 U.S. 368 (1981).

---

[1] "The provisions of [the Fourteenth Amendment of the Constitution of the United States provide] that no State shall deprive any person of his property without due process of law, or deny to any person the equal protection of the laws, govern the actions of the courts."; *King v. Grace*, 293 Mass. 244 (1936), quoting *Mooney v. Holohan*, 294 U.S. 103 (1936).

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are:

1. The Due Process Clause of the Fifth Amendment of the U.S. Constitution, which applies to the states under the incorporation doctrine;

2. The Due Process Clause of the Fourteenth Amendment of the U.S Constitution; and

3. The Equal Protection Clause of the Fourteenth Amendment.

The State has caused a deprivation of significant property interest of the Petitioners, without due process of law, and without the equal protection of the established state laws. In the instant case the State has further provided a trial without dignity or decorum, which violates the Due Process Clause and/or the Equal Protection Doctrine. Those constitutional provisions have been reproduced at App. h.

## STATEMENT OF THE CASE

September 1994, the Petitioners filed a toxic tort suit for personal injuries against a leather manufacturing company located in Peabody, Massachusetts. April 30, 1996, the defendant (the leather manufacturer) filed for a chapter 11 bankruptcy protection. January 6, 1999, during the bankruptcy proceedings, the Petitioners settled their toxic tort case with the insurer for the defendant, Travelers Indemnity Company ("Travelers"). The

settlement sum for the Petitioners was 2 million dollars.[2] All terms and conditions to said settlement were reviewed and approved by the presiding justice at the U.S. Bankruptcy Court in Boston.

After the settlement occurred, numerous attorneys (only some of whom had represented the Petitioners), sought to take the entire settlement in attorneys' fees and costs, and, although no longer counsel of record for the Petitioners, demanded that Travelers send the entire settlement check to them. Travelers, claiming to fear exposure to multiple claims, deposited the Petitioners' settlement funds in the Suffolk Superior Court in Boston, Massachusetts, in what is called an interpleader action. The trial judge took jurisdiction over the fund, released Travelers from the proceedings, and realigned the parties. The trial court designated the attorney lienholders to be the plaintiffs, and the Petitioners to be the defendants.

As set forth below, the attorney lienholders filed a slew of claims against the Petitioners' funds. The attorney lienholders asserted the refusal to immediately pay their fee demands constituted an "unfair or deceptive act or practice." Thus, they also sought to have any fees the jury would award them be doubled or trebled, pursuant to the state consumer protection statute of M.G.L. c. 93A, § 11.

January 6, 2002, the jury rendered their verdicts. The jury found that the Petitioners only owed the attorney lienholders the following sums:

---

[2] Other settlors were involved in the settlement agreement. They settled their claims for the sum of 7 million dollars.

- Pretrial, Attorney Albert P. Zabin, et al, demanded 40% of the Petitioners' 2 million dollars (i.e., $800,000.00), and sought to have the court award double or treble that sum in damages because Attorney Zabin[3] claimed that the Petitioners had engaged in unfair settlement practices to defraud him of those fees;

  The jury awarded Attorney Zabin: $ 0.00.

- Attorney Edward Greer also advanced claims against the petitioners, but the amount was never liquidated.

  The jury awarded Attorney Greer: $ 0.00.

- Attorney Edwin McCabe's claims were partially liquidated and partially unliquidated. The liquidated amount, alone, was in the sum of $134,014.97.

  The jury awarded Attorney McCabe: $ 68,507.00

---

[3] Even though he had a personal financial interest in the outcome of the trial, Albert P. Zabin's law partner, Robert Costello, admitted to going over to the Suffolk Superior Court to have an *ex parte* meeting with the trial judge. The *ex parte* meeting occurred while the trial judge had jurisdiction of the case. The judge denied the meeting when initially confronted. He admitted to it after learning that Mr. Costello had admitted to it under oath. Mr. Costllo also admitted that during the meeting he had offered the trial judge a prestigious social position. The trial judge also took the case by *de facto* assignment, in violation of procedural due process and the Equal Protection Clause, as the Massachusetts Superior Court has a rotation system for judges in order to ensure fairness to litigants.

- Attorney Michael Gilleran demanded 35% of the Petitioners 2 million dollars (i.e. $750,000.00);

The jury awarded Attorney Gilleran: $ 15,747.30[4]

The trial court, pretrial, released the Petitioners $200,000 of their 2 million dollar settlement to defend their property from the attorney claims to their entire settlements. However, in violation of due process, the trial court, pretrial, refused to make a determination of what the reasonable likelihood of recovery of the attorney lienholders was, as is required by Rules 4.1 and 65 of the Massachusetts Rules of Civil Procedure. Although the court took possession of the funds in April of 1999. The trial court did not require verified complaints or affidavits from the attorney lienholders. The trial court simply took control of the Petitioners' property, ruling that it would make a determination after the close of discovery. However, the trial court never did make a determination on the reasonable likelihood of recovery of the attorney lienholders. The Massachusetts Appeals Court has ruled that this conduct constitutes a violation of due process; *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22; 21 Mass. App. 488 (1986), but that standard was not applied to the Petitioners.

---

[4] $15,747.30 is the exact amount that the Petitioners had offered to pay Attorney Gilleran all along. However, Attorney Gilleran refused to accept it because he was seeking 35% of their settlement funds instead (i.e., $700,000.00). Attorney Gilleran clearly overreached. Overreaching is illegal in Massachusetts; *In the Matter of Fordham*, 423 Mass. 481, 668 N.E. 2d 816, 825 (1996). However, in the instant case courts have turned a blind eye to the overreaching, and consider it a non-issue in the Petitioners' pleadings.

Despite the above verdicts, after the jury trial the trial court declared that the attorney lienholders were the prevailing parties, and imposed a 12% penalty interest against the Petitioners, and also awarded the attorney lienholders their costs, stating it was a "punishment" for taking the attorneys' fee claims to trial. October 2002, the trial court established the amounts that the Petitioners owed to the attorney lienholders, pursuant to the jury verdict, plus the court's imposed punishment interest.

November 2002, the Petitioners moved the trial court to release the money owed to the attorney lienholders according to the jury verdict, plus interest, and release the rest of the money that belonged to the Petitioners (which was held by the trial court). The trial court refused to do that without providing any reason. March 22, 2003, the trial court entered final judgment, and left the distribution of the court-held funds unaddressed. Appeals to the final judgment were taken. The States are split on the issue that a trial court judgment is final, and has preclusive effect, regardless of the fact that a judgment is on appeal. Some Federal and State decisions have ruled that a trial court judgment has preclusive effect, regardless of the fact that a judgment is on appeal; See, e.g., *Southern Pac. Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 1011, 1018-1019 (D.C. Cir. 1984); *Bartlett* v. *Pullen*, 586 A.2d 1263, 1265 (Me. 1991); *O'Brien v. Hanover Insurance Company*, 427 Mass. 194, 692 N.E.2d 39 (1998) at 44, 427 Mass. 194, 692 N.E.2d 39 (1998). Other courts have ruled that a trial court judgment does not have preclusive effect while the judgment is on appeal; see, e.g., *Sandoval v. Superior Court*, 140 Cal. App. 3d 932, 936-937; 190 Cal. Rptr. 29 (1983); *Petition of Dono*van, 137 N.H. 78, 81;

623 Atl. 2d 1322 (1993). *In re Bogdanovich*, 292 F.3rd 104, 39 Bankr Ct. Dec 197, 2nd Cir. (N.Y.) (2002); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 5 U.S.P.Q.2d 1709, 9th Cir. (Cal.) (1988); *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1985-1 Trade Cases P 66, 606, 9th Cir. (Cal.) (1985); *McConnell v. Travelers Indemnity Co.*, 346 F.2d 219, 9 Fed. R. Serv.2d 1.3, 2, 5th Cir. (La.) (1965); *Rivera Rodriques v. First Bank Puerto Rico*, 184 F. Supp.2d, *D.Puerto Rico* (2002); *In re Transworld Foods, Inc.*, 41 B.R., 363, Bankr. M.D. Fla., Aug. 8, 1984; *In re Overmyer*, 32 B.R. 597, Bankr. S.D.N.Y. (1983); *In re* Levitt, 18 B.R. 598, Bank.E.D. Pa. (1982); and *In re: Meade Land & Development Co., Inc.*, 1 B.R. 279, 5 Bankr. Ct. Dec 991, Bank.E.D. Pa. (1979).

Massachusetts is one of the States that has ruled that a judgment is final when a trial court enters judgment, and that said judgment has preclusive effect; *O'Brien v. Hanover Insurance Company*, *supra.* In other words, the amounts that were owed to the attorney lienholders by the Petitioners became fixed and liquidated, and the rest of the Petitioners' court-held funds is the property of the Petitioners. Since the jury verdict established that the Petitioners owe the attorney lienholders less than $100,000.00, and the court imposed a 12% "punishment" interest (as of April of 1999, when the settlement funds were deposited into the court), the maximum amount the Petitioners could possibly owe the attorney lienholders is approximately $160,000.00. Since the trial court released the Petitioners $200,000 of their 2 million dollar settlement funds on deposit with the court, and the Petitioners received no additional funds, the Petitioners are being wrongly deprived by the State of approximately 1.6 million dollars of their own property.

However, since this case involves the financial interests of insiders of the Massachusetts courts,[5] the present courts have denied the Petitioners the equal protection of the laws.

Since the trial court refused to allow the Petitioners to pay the attorney lienholders after the judgment, and also refused to release the Petitioners their property, the Petitioners sought relief pursuant to M.G.L. c. 231, § 117, and Mass. R.A.P. 6 (a), as amended 378 Mass. 931 (1979). The Single Justice of the Appeals Court refused to grant any relief, ruling that the Petitioners had failed to show that the "extraordinary relief sought was warranted in these circumstances" (App. f). The Petitioners appealed to the Appellate Panel. The Appellate Panel refused to grant any relief (App. b and App. c). The Petitioners requested further appellate review from the Massachusetts SJC, but were denied further appellate review (App. a).

---

[5] "An attorney at law is not merely a member of a profession practicing for personal gain; he or she is an 'officer of the court'"; In re: Keenan, 47 N.E.2d 12, 313 Mass. 186 (1943).

## REASONS FOR GRANTING THE WRIT

1. To determine if, after the trial court has entered final judgment that establishes and liquidates the amounts owed by a defendant, a State court may continue to hold the defendant's property, above and beyond the amounts needed to satisfy the judgment; or if that constitutes a violation of the Fifth and/or Fourteenth Amendments to the United States Constitution.

2. The Massachusetts SJC has been vigilant about the property rights and equal protection of same sex partners; *Goodridge & others v. Department of Public Health & another*, 440 Mass. 309, 7798 N.E. 2d 941 (2003). However, it has been derelict about the property rights of minor children,[6] and others when the financial interests of insiders of the courts are at stake. That constitutes unequal treatment under the law. "The equal protection clause provides that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). This language

---

[6] Petitioner Athena Picciotto was a minor child during the lower court proceedings. The law imposes upon the courts a "heightened duty" to be extra sensitive to the interests of minor children. In fact, "Every minor plaintiff is a ward of the court when involved in litigation, and the court has a duty to protect minors' interests"; *Jamie Lynn OTT, A Minor, by her Father and Next Friend, Mark Out et al., v. Little Company of Mary Hospital, et al.*, 273 Ill. App.3d 563, 652 N.E.2d 1051, 210 Ill. Dec. (1995); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438 (1944). Instead, the Massachusetts courts afforded the Petitioner Athena Picciotto virtually none.

essentially mandates that "all persons similarly situated should be treated alike."; *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). This case provides an opportunity to ensure that the same standards that apply to other parties who engage in trade or commerce shall apply to attorney lienholders, despite being insiders of the courts.

3. Further, litigants should not be subject to a trial where the jurors are allowed to sit in the jury box and take evidence while dressed in Halloween costumes.

4. Litigants should not be in a courtroom where the American flag and the symbol of the court's authority is demeaned by the sitting judge's removal during the proceedings.[7]

5. Litigants should not be subjected to courts that authorize their opposition to pass out candies and joke bumper stickers to the jurors seated in the jury box. (The conduct degenerated to the point that the opposition passed out a cast list of who should play whom in the movie about this case. They suggested Robert Duvall of *Civil Action* fame be cast to play the trial judge, while the individual jurors were cast to be played by Jodi Foster, Robert DiNiro, etc.)

---

[7] M.G.L. c. 220, § 1, states that "The flag of the United States . . . shall be displayed in every court of justice of the Commonwealth while the court is in session."

6. Litigants should not have their property taken away to accumulate interest for the unfair benefit of insiders of the courts.

7. Consumer groups such as Massachusetts Public Interest Research Group (MASSPRIG), and Common Cause have recognized, and vigorously protest what they deem to be an ethical crisis in the present Massachusetts courts. When MASSPIRG learned of the conduct in the lower court, stating that they were acting on behalf of 45,000 Massachusetts consumers of legal services, they filed an *amicus brief* on behalf of the Petitioners, asking the higher court, to " . . . issue an order to show cause why a judicial investigation or a disciplinary investigation should not be initiated," regarding the conduct in the lower court. MASSPRIG's request was summarily denied (App. g). The problem for citizens of the State of Massachusetts is so pervasive that Common Cause wrote in a recent fund raiser flyer, "Our state system is in crisis and we are working hard to improve accountability and ensure that our courts permit the speedy and fair delivery of justice. We are also working to achieve a passage of a strong new ethics reform law." A recent report by a formally appointed commission (J. Donald Monan, S.J., Chair, March 4, 2003; http: www. Mass.gov/courtreform/final.pdf) found that the citizens of Massachusetts are served by a seriously flawed judicial system that has little or no judicial accountability, and is in dire need of reform.

## CONCLUSION

This case presents serious issues regarding due process and the level of dignity and decorum that is acceptable in an American court of law. The United States Supreme Court is asked to take judicial notice that Massachusetts is just one of three States in which judges are appointed for life, and they receive no outside periodic review. Despite the constitutional guarantees The Massachusetts SJC conducts itself in an insulated manner, and often fails to supervise obviously unacceptable conduct in the lower courts. From the Petitioners' standpoint, that conduct includes using the courts as an officially sanctioned vehicle to literally rob its citizens of their own funds for the benefit of insiders of the courts, and, worse yet, allowing them to enjoy a party-like atmosphere as they do it. The Petitioners respectfully request this Honorable Court grant certiorari to review those standards.

Melita Picciotto
Pro Se
418 Lafayette Street
Salem, Ma 01970
(978) 741-0218

Athena Picciotto
Pro Se
418 Lafayette Street
Salem, Ma 01970
(978) 741-0218

# APPENDIX

## SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RE: Docket No. FAR-14168

MELITA PICCIOTTO & another
vs.
ROBERT V. COSTELLO & others

App. Ct. Single Justice SU No. SUCV1999-01594
A.C. No. 2003-P-0925 2003-P-925
(Travelers Indemnity Company
vs. Stefano Picciotto & others)

## NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 06/30/04, the above-captioned Application for Further Appellate Review was denied. (Sosman, J., recused)

Susan Mellon, Clerk

Dated: June 30, 2004

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

03-P –925

TRAVELERS INDMENITY COMPANY

VS.

STEFANO PICCIOTTO & others[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In the underlying interpleader action filed with the agreement of the Picciottos, a judge dismissed the Travelers Indemnity Company (Travelers) from the case with prejudice after Travelers had transferred certain settlement proceeds into a court-administered escrow account. The narrow issue presented for review here is whether the single justice abused his discretion in denying the petition of Melita and Athena Picciotto, pursuant to M.G.L. c. 231, § 17, and Mass. R.A.P. 6(a), as amended, 378 Mass. 391 (1979), seeking a full or partial release of the remaining funds held in the account.

---

[1] Judith Picciotto; Melita Picciotto; Athena Picciotto; Juan Nunez; Foreign Car Center, Inc.; Albert P. Zabin, Robert V. Costello, and Joann D'Alcomo, individually and as partners in a partnership known as Schneider, Reilly, Zabin & Costello, P.C.; Schneider, Reilly, LLP; Michael C. Gilleran, Esq.; Gilleran & Mortenson, P.C.; Edwin McCabe, Esq. McCabe, Brown & Davis, P.C.; Edward Greer, Esq.; and Warren Five Cents Savings Bank.

After reviewing the record that was before the single justice and considering the arguments of the parties, we conclude that the Picciottos have failed to demonstrate any abuse of discretion in the denial of relief.

To the extent that the Picciottos challenge certain rulings made during the course of the instant appeal, we find no abuse of discretion by the single justice.

The motion to lift the injunction filed by Melita Picciotto and Athena Picciotto is denied.

The motion to file a supplemental brief filed by Melita Picciotto and Athena Picciotto is allowed.

Order denying petition for relief affirmed.

Order denying motion to order all parties to submit to mediation, or in the alternative, to release sufficient money to the Picciottos affirmed.

Order denying motion for reconsideration affirmed.

By the Court (Gelinas, Smith, & Trainor, JJ.)

Assist, Clerk

"s/_____".

Entered: May 10, 2004

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

03-P-1003

MELITA PICCIOTTO & another[2]

vs.

ROBERT V. COSTELLO & others[3]

MEMORANUDUM AND ORDER PURSUANT TO RULE 1:28

The judgment of dismissal entered in Suffolk Superior Court civil action No. 01-2319 is affirmed substantially for the reasons stated in the brief of the defendant attorneys, and for the reasons stated in pages twenty-two through thirty-seven and forty-two of the corrected brief of the defendant Travelers Indemnity Company.

Judgment Affirmed.

---

2 Athena Picciotto, a minor. by her father and next friend, Stefano Picciotto.

3 Albert P. Zabin and Joann D'Alcomo, individually and as partners of Schneider, Reilly, LLP; Edward Greer; Joel Z. Eigerman; Michael C. Gilleran, individually and as a partner of Pepe & Hazard, LLP; Gilleran & Mortenson, P.C.; Pep & Howard, LLP; Edwin McCabe; The McCabe Group; and Travelers Indemnity Company

By the Court (Gelinas, Smith, & Trainor, JJ.),

Assist, Clerk

"s/_____".

Entered: May 10, 2004

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

RE: No. 2003-J-0274

TRAVELERS INDMENITY COMPANY

VS.

STEFANO PICCIOTTO & others

NOTICEOF DOCKET ENTRY

Please take note that, with respect to the MOTION for stay under MRAP 6(A) and Petition pursuant to G.L. c. 231, § 117 with attach, filed by Melita Picciotto and Athena Picciotto. (Paper #1),

on June 11, 2003, the following order was entered on the docket of the above-referenced case:

Re#1 The petition is denied for failure to show that the extraordinary relief sought is warranted in these circumstances. (Grasso, J.) *Notice/Attest/Sikora, J..

Very truly yours,

The Clerk's Office

Dated: June 11, 2003

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
CLERK'S OFFICE
1500 NEW COURT HOUSE
BOSTON, MASSACHUSETTS 02108
96170 725-8106

November 29, 2002

RE: No. 2002-P-1003

MELITA PICCIOTTO & another
vs.
ROBERT V. COSTELLO & others

NOTICE OF DOCKET ENTRY

Please take note that, with respect to the Motion to file amicus brief by Massachusetts Public Interest Research Group (MASSPIRG), with brief attached. (Paper #251),

on November 27, 2002, the following order was entered on the docket of the above-referenced case.

RE#25: Denied. (Mills, J.) *Notice.

Very truly yours,

The Clerk's Office

Dated: November 29, 2002

## AMENDMENT [V]

Deprivation of property without due process of law

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use; without just compensation.

## AMENDMENT [XIV]

Property rights and equal protection of the laws not to be abridged by the States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State where in they reside. No State shall make or enforce any law, which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
NOV 1 - 2004
OFFICE OF THE CLERK

No. 04-444

In The

# Supreme Court of the United States

---

MELITA PICCIOTTO AND ATHENA PICCIOTTO,
PETITIONERS,

vs.

MICHAEL C. GILLERAN AND OTHERS,
RESPONDENTS.

---

**On Petition For Writ Of Certiorari To The Supreme Judicial Court For The Commonwealth of Massachusetts**

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

RICHARD W. RENEHAN
GOULSTON & STORRS, P.C.
400 Atlantic Avenue
Boston, MA 02110
(617) 482-1776
*Counsel of Record for Respondent Law Firms*

*Of counsel:*
Michael J. Stone, Esq.
Douglas Mansfield, Esq.
Robert T. Gill, Esq.
Timothy J. Dacey, Esq.

Blanchard Press, Inc. 617-426-6690

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the rulings of the Massachusetts appellate courts in *Melita Picciotto v. Robert V. Costello,* Appeals Court No. 2002-P-1003, raise any federal question for this Court to review.

2. Whether the rulings of the Massachusetts appellate courts in *Travelers Indemnity Company v. Stefano Picciotto*, Appeals Court Dockets Numbers 2003-J-0274 and 2003-P-925, constitute a final judgment within the meaning of 28 U.S.C. §1257.

## PARTIES AND CORPORATE DISCLOSURE STATEMENT

This Brief in Opposition is submitted on behalf of Michael G. Gilleran and the law firms with which he was associated, Gilleran & Mortensen, P.C. and Pepe & Hazard, LLP; Albert Zabin and the law firms of Schneider, Reilly, Zabin & Costello, P.C. and Schneider Reilly LLP; Joel Eigerman and the law firm of Roche, Carens & DeGiacomo, P.C.; Edwin McCabe and the law firm of The McCabe Group, P.C.; and Edward Greer (collectively "Respondents" or "the Law Firms.")

Gilleran & Mortensen, P.C., Schneider, Reilly, Zabin & Costello, P.C., Roche, Carens & DeGiacomo, P.C., and the McCabe Group, P.C. have no parent corporations and no publicly held company owns 10% or more of their stock.

## TABLE OF CONTENTS

PAGE

Statement of the Case . . . . . 1

Summary of Argument. . . . . 6

Argument . . . . . 7

The Dismissal of Melita's and Athena's Separate Lawsuit Raises No Substantial Federal Question.. . . . . 7

The denial of the Petitioners' Petition under Mass.Gen.Laws c. 231, §117 is not a Final Judgment. . . . . 8

The Petitioners have failed to demonstrate that they have been denied a Property Interest.. . . . . 11

Conclusion. . . . . 13

Statutory Appendix . . . . . 15

Supplemental Appendix. . . . . 16

## TABLE OF AUTHORITIES

### CASES

PAGE

*Brown v. Massachusetts Port Authority*, 371 Mass. 395, 357 N.E.2d 928 (1976) . . . . . 9

*Foreign Car Center, Inc. v. Salem Suede, Inc.*, 40 Mass.App.Ct. 15, 660 N.E.2d 687 (1996). . . . . 1

*Handy Cafe, Inc. v. Costello Distributing Co.*, 334 Mass. 707, 137 N.E.2d 218 (1956) . . . . . 9

*Jefferson v. City of Tarrant*, 522 U.S. 75 (1997). . . . . 8

*Juan Nunez v. Stefano Picciotto et al.*, Suffolk Superior Court Civil Action No. 04-0289. . . . . 12

*Keen v. Western New England College*, 23 Mass.App.Ct. 84, 449 N.E.2d 310 (1986). . . . . 7

*Market Street Ry.Co. v. Railroad Commission of California*, 324 U.S. 548 (1945). . . . . 8

*Minnick v. California Department of Corrections*, 452 U.S. 105 (1981) . . . . . 11

*O'Brien v. Hanover Insurance Company*, 427 Mass. 194, 692 N.E.2d 39 (1998) . . . . . 8

**STATUTES**

PAGE

28 U.S.C. §1257 . . . . . 6, 7, 8

Mass.Gen.Laws c. 214, §22 . . . . . 9

Mass.Gen.Laws c. 231, §6C . . . . . 3

Mass.Gen.Laws, c. 231, §117 . . . . . 5, 6, 7, 8, 9, 11

Mass.Gen.Laws. c. 221, §50 . . . . . 2

St. 1973, c. 1114 . . . . . 9

**RULES**

Massachusetts Rule of Civil Procedure 12(b)(9) . . . . . 7

Massachusetts Rule of Civil Procedure 22 . . . . . 3

## STATEMENT OF THE CASE

The Petitioners Melita and Athena Picciotto request this Court to review two decisions of the Massachusetts appellate courts for alleged constitutional infirmities. Their Petition is the latest act in a lengthy drama that began in 1983. The Respondents believe that a brief review of the earlier scenes in this drama will assist the Court in determining that the issues raised by the Petition are either not ripe for review or raise no substantial federal question.

The Petition has its genesis in a toxic tort action filed in the Superior Court Department, Essex County Division, of the Massachusetts Trial Court in March 1983 (the "Toxic Tort Action"). The plaintiffs in that action included Stefano and Judith Picciotto (the parents of the Petitioners Melita and Athena Picciotto), the Picciottos' business, Foreign Car Center, Inc., and Juan Nunez, an employee of Foreign Car Center. The plaintiffs alleged that emissions from a neighboring tannery, Salem Suede, Inc., injured the health of the individual plaintiffs and the business of Foreign Car Center. After the plaintiffs changed counsel several times, the case was tried to a jury in 1993, resulting in a judgment for the plaintiffs. The judgment was affirmed on appeal in 1996. *Foreign Car Center, Inc. v. Salem Suede, Inc.*, 40 Mass.App.Ct. 15, 660 N.E.2d 687 (1996).

The Petitioners Melita and Athena Picciotto were not parties to the Toxic Tort Action. In 1994, while the original case was pending on appeal, Mr. and Mrs. Picciotto and Foreign Car Center filed a new state court lawsuit against Salem Suede. The new lawsuit included Melita and Athena Picciotto as plaintiffs, but no

discovery was taken in the new case and the case was never tried.

After the judgment in the Toxic Tort Action was affirmed on appeal, Salem Suede's insurer, Travelers Indemnity Company, disclaimed coverage. The plaintiffs in the Toxic Tort Action brought a lawsuit against Salem Suede, seeking to collect their judgment, and against Travelers, claiming that Travelers engaged in unfair claims settlement practices in violation of Massachusetts law. Salem Suede then sought protection under Chapter 11 of the Bankruptcy Code. The lawsuit against Travelers was removed to the Bankruptcy Court and became an adversary proceeding in the Salem Suede Chapter 11 case. On January 6, 1999, after the claimants changed counsel several additional times, Travelers agreed to settle all the claims pending against Salem Suede (including the new lawsuit filed in 1994) for a lump sum payment of $9 million. The Travelers settlement agreement did not allocate the settlement proceeds among the claimants, who by this time included Melita and Athena Picciotto as well as the plaintiffs in the original Toxic Tort Action, Mr. and Mrs. Picciotto, Foreign Car Center, and Juan Nunez (collectively, the "Settling Claimants").

By the time of the settlement in 1999, the Settling Claimants had been represented by eight different law firms. Under Massachusetts law, an attorney who has appeared on behalf of a party in a lawsuit has a lien for the fair value of his services on any proceeds of the lawsuit. Mass.Gen.Laws. c. 221, §50. Given the likelihood that some of the law firms would assert a lien, Travelers insisted on a provision in the settlement agreement that it would not be required to

pay the settlement proceeds until all liens had been resolved. In an effort to satisfy this provision, the Settling Claimants demanded that the law firms release their liens, but most of the law firms refused. Travelers then paid the Settling Claimants $500,000, initiated an interpleader action in the Superior Court for Suffolk County pursuant to Massachusetts Rule of Civil Procedure 22 (the "Interpleader Action") and deposited the balance of $8,500,000 with the clerk of the court. The trial court dismissed Travelers from the Interpleader Action and realigned the parties, designating as plaintiffs five law firms which sought compensation for the work they had performed (the "Law Firms") and as defendants the Settling Claimants (including Melita and Athena), who denied that the Law Firms were entitled to any compensation and counter-claimed for malpractice, breach of fiduciary duty and other alleged wrongdoing.

The Interpleader case was tried to a jury for 63 days, beginning in late September 2001 and ending with a verdict on January 5, 2002. The jury found for the Law Firms, awarding them substantial fees and rejecting all of the Settling Claimants' allegations of malpractice and other misconduct. After deciding certain additional issues that it had reserved for itself, the trial court entered judgment on October 24, 2002. With interest at 12%, the total judgment in favor of the Law Firms came to $3,509,376, plus costs of $255,094.09. (In their Petition, Melita and Athena allege that they were subjected to a "penalty interest rate," Petition at 7, but the rate applied by the trial court is applicable in all Massachusetts contract actions. See Mass.Gen.Laws c. 231, §6C.) After the trial court denied their post-trial motions, the Settling Claimants filed notices of appeal. The court reporter is still preparing the massive trial

transcript, so the appeal in the Interpleader Action has not yet been docketed with the Massachusetts Appeals Court.

In May 2001, after discovery was complete in the Interpleader action and shortly before jury selection was scheduled to begin, Melita and Athena filed a separate lawsuit against the Law Firms and sought to have their new lawsuit consolidated with the Interpleader Action. The trial court denied their motion as untimely. After the jury verdict in the Interpleader Action, the trial court dismissed the separate lawsuit on the grounds that a prior action raising the same claims, the Interpleader Action, was already pending. The trial court also ruled that the issues raised by Melita's and Athena's separate lawsuit were barred by collateral estoppel.[1] Melita and Athena appealed from the judgment dismissing their separate lawsuit, but their appeal was rejected by the Massachusetts Appeals Court in a brief memorandum opinion, which is reproduced in the Appendix to the Petition for Certiorari at pages d-e. The Supreme Judicial Court denied Melita and Athena's request for further appellate review on June 30, 2004. Petition Appendix at page a.

While the Interpleader Action was pending in the trial court, the Settling Claimants (including Melita and Athena) filed numerous motions seeking distribution of the funds deposited by Travelers with the clerk of court. In response, the trial court released funds to the Settling Claimants totaling in the aggregate $ 3.2 million. Taken together with the $500,000 paid by

---

[1] A copy of the trial court's Rulings Upon the Defendant Parties' Motions to Dismiss is included in the Supplemental Appendix to this Brief at page 16.

Travelers when it filed the Interpleader Action, the total amount distributed to the Settling Claimants prior to the jury's verdict came to $3.75 million.[2] Dissatisfied with these distributions, the Settling Claimants filed three interlocutory appeals seeking the release of additional funds, all of which have been denied by the Massachusetts appellate courts.

The second case covered by the Petition now before this Court arises from the most recent attempt to obtain a distribution of the funds being held by the trial court. In June 2003, Melita and Athena Picciotto filed a petition with the Massachusetts Appeals Court pursuant to Mass.Gen.Laws, c. 231, §117, a statute which authorizes the appellate courts to suspend or modify any order of the trial court pending appeal.[3] The relief they sought was an order directing the clerk of court to distribute approximately $2 million to them as their share of the Travelers settlement. A single justice of the Appeals Court denied the petition "for failure to show that the extraordinary relief sought is warranted under these circumstances" (see Petition Appendix at page f) and a three judge panel of the Appeals Court affirmed on the grounds that Melita and Athena had failed to demonstrate any abuse of discretion. Petition Appendix at pages b-c. The Supreme Judicial Court denied further appellate review on June 30, 2004 at the same time that it denied further review in Melita and Athena's separate

---

[2] These calculations are based on the trial court's Order for Distribution to the Appellants for Fees and Costs of Appeal dated April 15, 2004. Most distributions were made to an attorney who represented all the Settling Claimants. However, $200,000 of the funds were earmarked for a law firm that represented Melita and Athena individually. See Petition at 6.

[3] The text of c. 231, §117 is set forth in the Statutory Appendix to this Brief at page 15.

action against the law firms. Petition Appendix at page a. This Petition for Certiorari followed.

## SUMMARY OF ARGUMENT

The separate lawsuit brought by Melita and Athena against the Law Firms was dismissed on adequate state law grounds. The dismissal raises no substantial federal question.

The Interpleader Action has not yet been docketed with the Massachusetts Appeals Court and no final judgment within the meaning of 28 U.S.C. §1257 has yet been rendered in that case. The statute under which Melita and Athena proceeded, Mass.Gen.Laws, c. 231, §117, gives the appellate court discretion to temper the effect of a judgment or other trial court order pending appeal, but is not intended to substitute for full appellate review in the ordinary course. No abuse of discretion has been shown in this case. The Petitioners may seek appellate review of all orders entered by the Trial Court, including any orders relating to the distribution of funds and any alleged improprieties in the conduct of the trial, once the appeal from the judgment in the Interpleader Action has been docketed.

In any event, the premise of the Petition for Certiorari, that Melita and Athena are entitled to $2 million of the Travelers settlement, is in fact in dispute. There is no judgment or written agreement demonstrating their entitlement to that amount. A separate declaratory judgment action to determine the respective interests of the Settling Claimants in the remaining escrow fund is now pending in the Massachusetts

Superior Court. The Petition for Certiorari seeks to do an end run around the pending case and should be denied for that additional reason.

## ARGUMENT

### I. The Dismissal of Melita's and Athena's Separate Lawsuit Raises No Substantial Federal Question.

Melita and Athena Picciotto ask this Court to grant certiorari in two cases: first, their appeal from the judgment of the Suffolk Superior Court dismissing their separate lawsuit against the law firms; and second, their appeal from the denial of their petition pursuant to Mass.Gen.Laws c. 231 §117 for relief pending appeal. The first of these cases is undoubtedly a final judgment within the meaning of 28 U.S.C. §1257, but the case raises no substantial federal question.

In dismissing Petitioners' separate lawsuit, the trial court ruled that dismissal was required because there was a prior lawsuit, the Interpleader Action, raising substantially the same issues already pending in the courts of the Commonwealth. Supplemental Appendix, *infra* at 20-21. The trial court's ruling was firmly based in state law. Massachusetts has a well-settled rule against claim splitting that is now incorporated in Massachusetts Rule of Civil Procedure 12(b)(9). See *Keen v. Western New England College*, 23 Mass.App.Ct. 84, 86-7, 449 N.E.2d 310, 311-12 (1986) and cases cited. The trial court also ruled that the claims that Melita and Athena sought to raise in their separate lawsuit had already been rejected in the Interpleader Action, either by the court in granting partial summary

judgment for the law firms or by the jury in their verdict on the remaining claims, and were therefore barred by collateral estoppel. Supplemental Appendix, *infra* at 21-22. Under Massachusetts law, a judgment may be final for purposes of issue preclusion even though an appeal is pending. *O'Brien v. Hanover Insurance Company*, 427 Mass. 194, 201, 692 N.E.2d 39, 44 (1998). Noticeably absent from the trial court's ruling and from the brief memorandum opinion of the Appeals Court is any discussion of the Constitutional issues that the Petitioners seek to bring before this Court.

Since the Petitioners' separate lawsuit against the Law Firms was dismissed on state law grounds, there is no basis for granting certiorari in that case.

## II. The denial of the Petitioners' Petition under Mass.Gen.Laws c. 231, §117 is not a Final Judgment.

To qualify as "final judgment" within the meaning of 28 U.S.C. §1257, the state court judgment must be "final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street Ry.Co. v. Railroad Commission of California*, 324 U.S. 548, 551 (1945) quoted with approval in *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). Measured against this standard, the denial of Petitioners' Petition under Mass.Gen.Laws c. 231, §117 does not qualify as a final judgment.

Mass.Gen.Laws c. 231, §117 provides, in relevant part:

> After an appeal has been taken from a final judgment of the superior court,....the appellate

> court may, by an order, on terms or otherwise, suspend the execution or operation of the order appealed from, **pending the appeal,** and may modify or annul any order made for the protection of the rights of the parties, **pending the appeal;**....(emphasis supplied).

The relief that the statute contemplates is clearly interlocutory in character. Under §117, the appellate court may make appropriate orders to protect the rights of the parties while the case is pending on appeal, but these orders are temporary in nature and are not intended as a substitute for appellate review of a final judgment on a full record. Decisions under the predecessor of §117, Mass.Gen.Laws c. 214, §22, confirm that the statute permits the appellate court to "preserve the status quo upon conditions," *Brown v. Massachusetts Port Authority*, 371 Mass. 395, 403, 357 N.E.2d 928, 932 (1976), but does not authorize the court to decide the merits of the appeal. *Handy Cafe, Inc. v. Costello Distributing Co.*, 334 Mass. 707, 708, 137 N.E.2d 218, 218-19 (1956).[4]

The Massachusetts appellate judges who dealt with Melita and Athena's petition understood the limited role they were supposed to play under the statute. The single justice who first dealt with the petition ruled that the Picciottos had failed "to show that the extraordinary relief sought is warranted in these circumstances." Petition Appendix at page f. The appellate panel who reviewed the

---

[4] Mass.Gen.Laws c. 214, §22 formerly granted the Supreme Judicial Court the power to suspend or modify orders of the trial court pending appeal. When Massachusetts adopted new rules of appellate procedure, the legislature enacted c. 231, §117, which confers the same power on the "appellate courts." St. 1973, c. 1114.

single justice's decision affirmed it on the grounds that "the Picciottos have failed to demonstrate any abuse of discretion in the denial of relief." Petition Appendix at page e. Both the single justice and the appellate panel treated the Picciottos' petition as raising a question of discretionary relief. Neither dealt with the constitutional issues that the Picciottos ask this Court to review.

Denial of the Petition for Certiorari will not foreclose the Petitioners' right to seek appellate review of their constitutional claims. The Petitioners have filed a notice of appeal in the Interpleader Action. The transcript is being prepared and in due course the appeal will be docketed with the Massachusetts Appeals Court. The Petitioners will then be able to press their constitutional claims in the Massachusetts appellate courts and, if appropriate, in this Court, based on a full record of what transpired in the trial court.

Indeed, some of the incidents that the Petitioners cite to show that proceedings in the trial court were "without dignity or decorum," Petition at 3, can only be reviewed on a full record. For example, the Petitioners claim that a partner of one of the attorneys seeking fees had an *ex parte* meeting with the trial judge, at which he offered the trial judge a "prestigious social position." Petition at 5, n.3. In a memorandum denying the Petitioners' motion to disqualify, however, the trial judge explained that the *ex parte* meeting was a brief encounter in a courthouse corridor, and the "prestigious social position" was an offer to serve in the alumni organization of a law school, an offer which the trial judge immediately refused.[5] There cannot be meaningful review of this issue

[5] The trial court explained its position in a Ruling upon the Picciotto Parties' Motion for Recusal dated February 2,

without a full appellate record. Compare *Minnick v. California Department of Corrections,* 452 U.S. 105, 127 (1981).

Similarly, the Petitioners complain that the jurors heard evidence "while dressed in Halloween costumes." Petition at 11. Respondents recall, however, that the jurors in the Interpleader Action sought permission from the trial court to wear costumes on Halloween day. The trial court consulted the attorneys for the parties, including the attorney for the Picciottos, and, hearing no objection, granted the jurors' request. The full record will show whether this incident was an affront to the dignity of the court, as the Petitioners claim, or a harmless diversion to relieve the tedium of a very long trial.

Since the state appellate courts have not completed their review of the Interpleader Action—indeed, have not begun their review—the Petition for Certiorari to review the denial of the Picciottos' daughters' petition under Mass.Gen.Laws c. 231, §117 should be denied.

## III. The Petitioners have failed to demonstrate that they have been denied a Property Interest.

The premise of the Petitioners' claim is that they have been denied an unquestioned right to $2 million of the $9 million settlement with Travelers Indemnity Company. Yet the Petitioners fail to cite any judgment or other court order establishing their right to $2 million, and in fact there is none. The pleadings in the

---

2002. That ruling will be part of the appellate record once the appeal in the Interpleader Action is docketed.

Interpleader Action did not address the allocation of the settlement proceeds among the Settling Claimants. Moreover, the settlement agreement with Travelers does not allocate the proceeds among the Settling Claimants. What then is the basis for the Petitioners' assertion that $ 2 million is theirs by right?

Although the Petition for Certiorari is silent on the question, discovery in the Interpleader Action demonstrated that the Petitioners' claim is based on an oral allocation agreement among the Settling Claimants reached at some point during the settlement negotiations with Travelers. The precise terms of that agreement are, however, hotly disputed. In January 2004, Juan Nunez, one of the Settling Claimants, filed suit in Suffolk Superior against the other Claimants, including Melita and Athena, seeking a declaratory judgment concerning the distribution of whatever settlement funds remain after payment of the judgment in favor of the Law Firms. In his complaint, Mr. Nunez alleges that, under the oral allocation agreement, he is entitled to receive $3 million net of any payments to the Law Firms. Mr. Nunez also estimates that, if the Law Firms are paid and he receives the full amount to which he is entitled, the balance remaining in the registry of the court for distribution to Mr. and Mrs. Picciotto, Foreign Car Center, and the Picciotto daughters will be approximately $180,000.[6]

Before they can argue that they have been deprived of $2 million without due process of law, Melita and Athena Picciotto must establish that they have a right to $2 million. They have not yet done so. Their

---

[6] See the Complaint filed by Mr. Nunez in *Juan Nunez v. Stefano Picciotto et al.,* Suffolk Superior Court Civil Action No. 04-0289.

Petition for Certiorari is an attempt to short-circuit the lawsuit brought by Mr. Nunez to establish the respective rights of the Settling Claimants to the remaining proceeds. For this additional reason, the Petition for Certiorari should be denied.

## CONCLUSION

For the foregoing reasons, the Petition for Certiorari of Melita and Athena Picciotto should be denied.

Richard W. Renehan
Goulston & Storrs
*A Professional Corporation*
400 Atlantic Avenue
Boston, MA 02110
617-482-1776

Counsel of Record for the
Respondent Law Firms and Attorney
for Michael Gilleran,
and the Law Firms of Shafner,
Gilleran & Mortensen, P.C. and
Pepe & Hazard LLP

Of counsel:

Michael J. Stone, Esq.
Peabody & Arnold, LLP
30 Rowes Wharf
Boston, MA 02110-3342
*Counsel to:* Albert Zabin and the law firms of Schneider, Reilly, Zabin & Costello, P.C. and Schneider Reilly LLP

Douglas Mansfield, Esq.
Casner & Edwards, LLP
303 Congress Street
Boston, MA 02210
*Counsel to:* Edwin McCabe and the law firm of The McCabe Group, P.C.

Robert T. Gill, Esq.
Peabody & Arnold, LLP
30 Rowes Wharf
Boston, MA 02110
*Counsel to:* Joel Eigerman and the law firm of Roche, Carens & DeGiacomo, P.C.

Timothy J. Dacey, Esq.
Goulston & Storrs, P.C.
400 Atlantic Avenue
Boston, MA 02210
*Counsel to:* Edward Greer

## STATUTORY APPENDIX

Massachusetts General Laws c. 231

*Section 117. Temporary appellate relief from final judgments pending appeal.*

After an appeal has been taken from a final judgment of the superior court, the land court, the housing court of the city of Boston, the western division of the housing court department, the northeastern division of the housing court department, the southeastern division of the housing court department or the housing court of the county of Worcester, the appellate court may, by an order, on terms or otherwise, suspend the execution or operation of the final judgment appealed from, pending the appeal, and may modify or annul any order made for the protection of the rights of the parties, pending the appeal; but, until such order has been modified or annulled, the justice of the superior court by whom the final judgment appealed from was made, or any other justice of said court, or the justice of the land court, the judge of the housing court of the city of Boston, the western division of the housing court department, the northeastern division of the housing court department, the southeastern division of the housing court department, or the housing court of the county of Worcester, by whom the judgment appealed from was made, may make any proper interlocutory orders, pending such appeal, including orders for the appointment of receivers, of injunction, of prohibition, and orders for continuing in force such orders previously made, or for modifying or dissolving them. The justice or judge who makes any such interlocutory orders may enforce them by appropriate proceedings, pending the appeal.

## SUPPLEMENTAL APPENDIX

Rulings Upon the Defendant Parties' Motions to Dismiss
in
*Melita Picciotto v. Robert V. Costello et al.*,
Suffolk Superior Court
Civil Action No. 01-2319-G.

Ruling

1. All defendants have effectively moved to dismiss all claims of the plaintiffs Melita Picciotto and Athena Picciotto. Those motions include the following.

   (a) The motion to dismiss the first amended verified complaint, docketed as entry 6 on or about August 9, 2001, and submitted by defendants Robert V. Costello, Albert P. Zabin, and JoAnne D'Alcomo, individually and as partners in a partnership known as Schneider, Reilly, LLP; defendant Schneider, Reilly, Zabin & Costello, P.C.; and Schneider, Reilly, LLP (collectively "the SRZC parties").

   (b) Defendant Edward Greer's joinder in the SRZC motion to dismiss the amended complaint docketed as entry 16 on or about August 22, 2001.

   (c) The joinder in the SRZC motion to dismiss the amended complaint docketed as entry 7 on or about August 7, 2002, and submitted by defendants Michael C. Gilleran individually and as a partner in the partnership known as

Pepe & Hazard, LLP, Pepe & Hazard LLP, and Gilleran & Mortensen, P.C. (collectively "the Gilleran parties").

(d) The motion of defendant Joel Eigerman to dismiss the amended complaint, docketed as entry 11 on or about August 11, 2001.

(e) The motion of defendants Edward McCabe and the McCabe Group, P.C., to dismiss the first amended complaint, docketed as entry 12 on or about August 16, 2001.

(f) The motion of the defendant Travelers Indemnity Company to dismiss Count Six of the amended complaint.

2. Upon consideration of the original and the amended complaint, all motion materials, all opposition materials, and all pertinent record materials in the prior action of *Zabin, et al. v. Picciotto, et al.*, Suffolk Superior Court Civil Action No. 99-1594-A, the court hereby *ALLOWS* all defendants' motions to dismiss with prejudice the claims of the amended complaint (i.e. all claims)of the present action.

## GROUNDS

1. The claims of the amended complaint reduce to the charge that each of the defendants wrongfully interfered with receipt by Melita and Athena Picciotto respectively of $1.5 million and $.5 million agreed by the six Picciotto parties (Stefano, Judith, Foreign Car Center Corporation, Melita, Athena, and Juan Nunez) to be distributional shares of the Travelers settlement of January 6, 1999, for Melita and Athena. The means of interference was the assertion of fee claims by the lawyers and law firms and their litigation efforts effectively causing the placement of the majority of the settlement proceeds into escrow until adjudication of their fee claims; and the Interpleader action of Travelers Indemnity Company effectively accomplishing the same result. The claims of the lawyers and law firms and the action of Travelers became *Zabin, et al.* v. *Picciotto, et al.*, Suffolk CA 99-1594. That action has proceeded through extensive pretrial discovery and motion practice resulting in summary judgment disposition of certain Picciotto parties' counterclaims; and through an extensive trial resulting in jury verdicts in favor of all the lawyers and law firms for substantial fees and reimbursable expenses to be paid by the Picciotto parties.

2. In this action, filed more than two years after commencement of Civil Action 99-1594-A, Melita and Athena charge the following against the attorneys, law firms, and/or Travelers Indemnity Company.

(a) *Count One.* Tortious interference with the entitlement to their settlement shares by the Gilleran parties by reason of those parties' post-settlement efforts to collect fees for services rendered to the Picciotto parties, including communication with Travelers and assertions of claims and escrow measures in Civil Action 99-1594-A.

(b) *Count Two.* Tortious interference with the same settlement share entitlements by reason of the efforts of the SRZC parties to detain the settlement proceeds in escrow and to pursue fee collection in Civil Action 99-1594-A.

(c) *Count Three.* Tortious interference of the same kind on the part of the individual attorneys Robert V. Costello and Michael C. Gilleran.

(d) *Count Four.* Tortious interference and bad faith assertion of Chapter 93A claims by individual attorneys Costello and Greer.

(e) *Count Five.* Tortious civil conspiracy by all the individual attorneys and their law firms to characterize the claims and entitlements of Melita and Athena as valueless and to deprive them of those entitlements by excessive fee liens and detention of settlement proceeds in Civil Action 99-1594-A.

(f) *Count Six.* Tortious civil conspiracy by Travelers Indemnity Company with the Gilleran parties to deprive the Picciotto parties, and Melita and Athena in particular, of

their settlement proceeds, by tactics in Civil Action 99-1594-A, including the evasion of discovery and the detention of the majority of settlement funds in interpleader escrow.

3. *Prior pending action. Mass. R. Civ. P. 12(b)(9).* Melita and Athena are parties to Civil Action 99-1594-A. They have been represented by counsel throughout that litigation. In the course of that prior pending proceeding they have made in substance the same claims against the same attorneys and law firm as appear in the present Counts One through Five; and at all times could have made precisely the same claims as the present ones in Civil Action 99-1594-A. Those essential common claims are that the attorneys do not have valid fee and lien claims; and that their detention of the settlement proceed in the interpleader escrow fund is therefore unmeritorious and wrongful. These claims at all times formed essential issues of the prior pending action.

   (a) In Civil Action 99-1594-A, the court addressed these assertions by all the Picciotto parties against all attorney parties as counterclaim counts for (a) abuse of process, and (b) civil rights violations; and entered summary judgment against the Picciotto parties upon those counts. Docket entry 367 dated June 19, 2001.

   (b) Further, the validity of the claims to fees and recovery of expenses by each attorney and law firm went forward to trial and resulted in

favorable verdicts for each. Docket Entry 498 dated January 7, 2002.

(c) Consequently the present claims by Melita and Athena Picciotto were contained in the prior pending action. They are repetitive and unnecessary in the form of the present lawsuit. They require dismissal under Mass. R. Civ. P. 12(b)(9). See *Guindon Insurance Agency, Inc.* v. *CU Ins. Co.*, 15 Mass. App. Ct. 931, 932 (1983), and cases cited. "Everything raised on the second action, to the extent that it was not simply a carbon copy of the first, should have been the subject of a motion to amend the complaint."

4. *Collateral estoppel.* In addition, the present claims of tortious interference and conspiracy effectively went forward to adjudication on their merits in Civil Action 99-1594-A. The entry of summary judgment against the counterclaim counts against the attorneys for abuse of process and civil rights violation (by reason of their pursuit of their fee claims in 99-1594-A) comprised on adjudication. The resulting jury verdicts finding an entitlement to fees and expenses on the part of each of the attorneys and law firms constitutes an adjudication against the Picciottos' allegation of the wrongful or tortious character of the attorneys' post-settlement efforts by litigation and negotiation to collect their claimed fees and reimbursable expenses. These adjudications necessarily reject the present claim of wrongful interference and conspiracy asserted by Melita and Athena. Their collateral estoppel force is

conclusive. It furnishes a dispositive affirmative defense and ground for dismissal with prejudice as a mater of law under Mass. R. Civ. P. 12(b)(6). *Bagley* v. *Moxley*, 407 Mass. 633, 637 (1990); and *Osserman* v. *Jacobs*, 369 Mass. 201 and n.3 (1975). Consequently, collateral estoppel under Rule 12(b)(6) furnishes a separate, independent, and adequate ground for dismissal for all claims against the attorney parties in Counts One through Five.

5. As to Count Six against Travelers Indemnity Company for conspiracy, dismissal with prejudice is appropriate upon multiple independent grounds.

   (a) Under the undisputed terms of the Settlement Agreement of January 6, 1999, and of the Amended Settlement Agreement of March 12, 1999, all Picciotto parties (including Melita and Athena) effectively agreed to the escrow and interpleader process employed Travelers.

   (b) The court, by supervision of and distributions from the escrow fund, controlled the flow of money to the Picciotto parties. They cannot impute fault or liability to Travelers for the rulings and orders of the court.

   (c) Travelers refusal to accept the discovery demands of the Picciotto parties in Civil Action 99-1594-A resulted in and from rulings of the discovery master and judge, not from unilateral conduct by Travelers.

(d) The plaintiffs Melita and Athena have failed to plead any facts amounting to the "peculiar power of coercion" necessary for the cause of action of tortious civil conspiracy in Massachusetts. See *Massachusetts School of Law* v. *American Bar Association*, 952 F. Supp. 884, 890 (D. Mass. 1997); *Neustadt* v. *Employees Liability Assurance Corp., Ltd.*, 303 Mass. 321, 324-326 (1939) (full discussion and collection of authority); and *Caverno* v. *Fellows*, 286 Mass. 440, 443-444 (1934). That omission entitles Travelers to dismissal as a matter of law under Rule 12(b)(6).

## CONCLUSION

1. The attorneys and law firms are entitled to dismissal with prejudice of Counts One through Five by reason of the presence of those claims in the prior pending action of Suffolk Civil Action no. 99-1594-A. Mass. R. Civ. P. 12(b)(9).

2. As an independent and adequate ground for dismissal with prejudice of Counts One through Five, collateral estoppel precludes those claims by reason of their prior adjudication against Melita and Athena Picciotto in Suffolk Civil Action No. 99-1594-A, Mass. R. Civ. P. 12(b)(6).

3. Undisputed facts furnish Travelers with a conclusive affirmative defense against the claim of civil conspiracy in Count Six. Independently, the absence of any allegations of a "peculiar power of coercion" leave the claim incomplete as a matter of law. Mass. R. Civ. P. 12(b)(6).

_____

Mitchell J. Sikora, Jr.
Justice of the Superior Court

*Dated*: April 5, 2002

(3)

Supreme Court, U.S.
FILED
NOV 10 2004
OFFICE OF THE CLERK

No. 04-444

IN THE

# Supreme Court of the United States

MELITA PICCIOTTO AND ATHENA PICCIOTTO
*Petitioners,*

v.

MICHAEL C. GILLERAN AND OTHERS,

*Respondents.*

On Petition For Writ Of Certiorari
To The Supreme Judicial Court For
The Commonwealth Of Massachusetts

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERIORARI

Melita Picciotto
Pro Se
418 Lafayette Street
Salem, MA 01970
(978) 741-021

Athena Picciotto
Pro Se
418 Lafayette Street
Salem, MA 01970
(978) 741-021

TABLE OF CONTENTS

Page

INTRODUCTION ..... 1

REASONS FOR GRANTING WRIT ..... 2

I. This Court Has Never Ruled on What Constitutes a Final Judgment, i.e., When a Final Judgment Occurs. The States Are Split.

II. It Would be of Public Interest to Establish if the Continued Retention by the Trial Court of the Petitioners' Property (Settlement Funds) After Final Judgment Has Been Entered by the Trial Court, and the Court's Refusal to Allow the Petitioners to Pay Their Judgments While it Imposes Post Judgment Interest (and Thus, Transfers the Property of the Petitioners to the Attorney Lienholders), Violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

III. The State Courts Retained the Petitioners' Property at the Request of the Attorney Lienholders, and Further Deprived the Petitioners Recourse to Recover Their Property by Summarily Dismissing the

Petitioners' Lawsuit Against the Respondents. That Constitutes a Deprivation of Property Rights Without Due Process of Law or Equal Protection of the Laws.

CONCLUSION ..... 10

SUPPLEMENTAL APPENDIX..... a

## TABLE OF AUTHORITIES

CASES Page

*Chiao Yun Ku v. Town of Framingham,*
53 Mass. App. Ct. 727, 729 (2002) ..... 6

*Correia v. De Simone*, 34 Mass. App. Ct.
601, 603-04 (1993) ..... 6

*East Cambridge Savings Bank v. Wheeler*,
422 Mass. 621, 623-624 (1966) ..... 6

*Florida Trailer & Equipment Co. V. Deal*,
284 F.2d 567, 571 (5th Cir. 1960). ..... 5

*Forman v. Davis*, 371 U.S. 178, 83 S.Ct.
227, 9 L.Ed. 2d 222 (1962) ..... 2

*Greenspan v. Bogan*, 492, F.2d 375, 381
(1st Cir. 1974) ..... 5

*In Re: Murchison*, 349 U.S. 133, 136 (1955) ..... 9

*O'Brien v. Hanover Insurance Company*,
427 Mass. 194, 201, 692 N.E.2d 39, 44, (1998) ..... 4

*Paixao v. Paixao*, 429 Mass. 307,
309-311 (1999) ..... 6

*The Suffolk Bank v. The Worcester Bank,*
22 Mass. (5 Pick.) 106; (1827) ..... 3

*Underwood v. Coolidge Ice Co.*, 232 Mass.
124, 122 N.E. 270 (1919 ..... 3

*United Founders Life Ins. Co. v. Consumer's National Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1960) ..... 5

STATUTES

28 U.S.C. § 1257 ..... 10

RULES

*Smith and Zobel's Mass Practice*
Rule 67 ..... 3

OTHER AUTHORITIES

*Massachusetts Rules of Courts*
Superior Court Standing Order No. 9-80 ..... 4

## INTRODUCTION

The Respondents urge this Court not to grant writ based on the following arguments:

1. There is no federal question;
2. There is no final judgment; and
3. The Petitioners have failed to demonstrate that they have been denied a property interest.

The facts of this case do not support the Respondents' arguments. The State has violated the Petitioners' guarantees of the Fourteenth Amendment of the Constitution of the United States by:

1. Depriving the Petitioners of their property, preventing the Petitioners from tendering payment, and continuing to shift the Petitioners' property to the Respondents through a 12% Post Judgment Interest.
2. There is a final judgment, and the amounts owed by the Petitioners became fixed and liquidated in October of 2002; and
3. The Petitioners have demonstrated that they have been denied substantial property interest by the State by:

    a. Refusing, after the trial court entered final judgment, to release the portion of their property that was not needed to secure any attorneys' liens; and

    b. Summarily dismissing their lawsuit to recover their property.

## REASONS FOR GRANTING THE WRIT

**I. This Court Has Never Ruled on What Constitutes a Final Judgment, i.e., When a Final Judgment Occurs. The States Are Split.**

**II. It Would be of Public Interest to Establish if the Continued Retention by the Trial Court of the Petitioners' Property (Settlement Funds) After Final Judgment Has Been Entered by the Trial Court, and the Court's Refusal to Allow the Petitioners to Pay Their Judgments While It Imposes Post Judgment Interest (and Thus, Transfers the Property of The Petitioners to the Attorney Lienholders), Violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.**

**II. The State Courts Retained the Petitioners' Property at the Request of the Attorney Lienholders, and Further Deprived the Petitioners Recourse to Recover Their Property by Summarily Dismissing the Petitioners' Lawsuit Against the Respondents.[1] That Constitutes a**

---

[1] The reason that lawsuit was filed by the Petitioners was to recover their property, after the attorney lienholders' wrongfully interfered with the Petitioner receiving their property by demanding the entire settlement. Prior to filing that lawsuit, the Petitioners sought leave of court to amend the pleadings to bring forth those claims. Even though leave shall be freely given when justice so requires; *Forman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962), the trial court denied the request.

**Deprivation of Property Rights Without Due Process of Law or Equal Protection of the Laws.**

## FACTUAL BACKGROUND

March 22, 2003, the judgment in the interpleader action became final (A. a), yet, the trial court continued to retain the Petitioner's property for the benefit of private parties, and enhanced the attorney lienholders' jury verdicts through the application of 12% "punishment"[2] post judgment interest.[3] Under

---

[2] The Respondents are being disingenuous with this Court to suggest that the 12% interest was not to, as the court itself stated, "punish" the clients for taking the attorneys' fee claims to trial, and that interest is automatically imposed. The truth is that Massachusetts law holds that depositing funds into a court-held escrow account "stops the interest from running, - other than what is generated by the actual fund itself."; *The Suffolk Bank v. The Worcester Bank,* 22 Mass. (5 Pick.) 106 (1827); *Underwood v. Coolidge Ice Co.*, 232 Mass. 124, 122 N.E. 270 (1919); see also *Smith and Zobel's Mass Practice* explaining Rule 67. The higher courts refused to address this when asked to consider the lack of constitutionality in continuing to refuse to pay the Respondents, while also retaining the Petitioners' property in order to transfer the Petitioners' property to the Respondents to enhance attorney lienholders fees.

[3] As explained on page seven of the Petitioners' writ, in November of 2002, the Petitioners moved the trial court to release the money owed to the attorney lienholders according to the jury verdict (including the accrued interest), and release the rest of the property that belonged to the Petitioners, but was still being held by the trial court. The trial court refused to do that, without providing any reason. However, its 12% "punishment" interest in favor of attorney lienholders makes the reason easy to divine.

Massachusetts law, contrary to some other jurisdictions, when a trial court enters judgment, the judgment is final, even though the case may still be pending on appeal; *O'Brien v. Hanover Insurance Company*, 427 Mass. 194, 201, 692 N.E.2d 39, 44, (1998).

- April 5, 2002, the same trial judge who had imposed himself *de facto* without following the requisite procedure for a special assignment[4] to preside over the interpleader action, and had denied the Petitioners' request to amend the pleadings, took another *de facto* seizure of the Petitioners' lawsuit,[5] and summarily dismissed the Petitioner's rights to that lawsuit. May 10, 2004, the appeals court affirmed the Order of Dismissal. June 30, 2004, the Massachusetts Supreme Judicial Court affirmed that

---

[4] In Massachusetts, judges are rotated on a pre-established schedule. A judge may never impose himself into a case without special assignment by the chief justice the Superior Court, pursuant to Standing Order No. 9-80, and only after notice and an opportunity to be heard is provided to all parties. That did not happen in this case.

[5] The Respondents assert that discovery was "complete" in the interpleader action on May 2001 (at page 4). That is demonstrably false. The underlying record proves that August 21, 2001, in the interpleader action, the Respondents conducted a lengthily deposition of Petitioner Melita Picciotto as part of the ongoing discovery. The Petitioners had been forced to file their lawsuit against the Respondents on May 21, 2001, because the trial judge had already refused to allow an amendment to their pleadings (see footnote 1 above).

order by *refusing to grant any further appellate review in the dismissed cases.*

- July 16, 2004, the state court distributed to Respondent Attorney Gilleran and his law firms, the sum of $1,782,731.65 (A. b) and another $69,505,22 on July 22, 2004 (A. d).

- The state court's distribution July 22, 2004, to pay Attorney Gilleran the judgment of $15,747.30, that Attorney Gilleran held against the Petitioners has been more than fully satisfied. However, the trial court continues to withhold the Petitioners property.

- The Respondents admit that the Petitioners settled their claims[6] against the Travelers January 6, 1999 (see page 2 of Respondents' Brief in Opposition).

- Through footnote 2 of page 5, the Respondents also confirm that the Petitioners only received $200,000 of their 2 million-dollar settlement to pay a law firm that represented the Petitioner's interests.

---

[6] A court, in reviewing a settlement [agreement] need not engage in a trial of the merits, "for the purpose of settlement is precisely to avoid such trial."; Greenspan *v. Bogan*, 492, F.2d 375, 381 (1st Cir. 1974); see also *United Founders Life Ins. Co. v. Consumer's National Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1960) and *Florida Trailer & Equipment Co. V. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). The assertions of the Respondents before this Court that the Petitioners did not want to pay any attorney fees is readily proven false through the documents in the underlying record. The Respondents are obviously trying to create a controversy as a means to avoid this Court's scrutiny.

- The Respondents attempt to create a controversy by stating that in January 2004, Juan Nunez, one of the settling claimants, filed suit in Suffolk Superior Court against the other claimants, including Melita and Athena, seeking a declaratory judgment concerning a distribution of most of the settlement funds remaining after payment of his judgment in favor of the law firms. (Respondents' brief at page 12).

- In fact, Mr. Nunez entered into a secret settlement agreement with Respondent Gilleran, and filed a new lawsuit against the petitioners. The lawsuit is frivolous because Mr. Nunez filed an affidavit in the interpleader action, attesting as follows:

AFFIDAVT OF JUAN NUNEZ

Juan Nunez, being duly sworn, hereby deposes and states:

1. I make this affidavit based upon my own personal knowledge.

2. When we settled with Travelers in January, 1999, it was agreed among myself, Stefano, Judy, Melita, Athena, and Foreign Car Center, Inc., that 2 million dollars of the settlement funds was specifically for settlement of Athena and Melita's claims.

Signed under the pains and penalties of perjury this 18th day of February 2000.

_____

Juan Nunez

Thus, judicial estoppel prevents Mr. Nunez from now rewriting the agreed upon allotments, and prevents the court from redistributing the settlement funds of the Petitioners; *Paixao v. Paixao*, 429 Mass. 307, 309 – 311(1999); *East Cambridge Savings Bank v. Wheeler*, 422 Mass. 621, 623-624 (1966); *Chiao Yun Ku v. Town of Framingham,* 53 Mass. App. Ct. 727, 729 (2002) and *Correia v. De Simone*, 34 Mass. App. Ct. 601, 603-04 (1993).

- Furthermore, pursuant to the trial court's Order of October 9, 2001 (item 2 A at A. g), the Petitioners' settlement agreement with Mr. Nunez "binds" Mr. Nunez[7] and he cannot change his mind years later.

- Moreover, all settling parties, including the attorney who represented Mr. Nunez at the settlement, have

---

[7] The trial judge order asserted that the Petitioners' property rights remained intact, and, thus, formed the foundation for the trial judge preventing the Petitioners from obtaining any adjudication from the jury. The ruling of the trial judge, which was memorialized in the transcript, is as follows: "And if the attorneys' recovery, if any, falls short of exhausting the entire fund, [the Petitioners'] claims are still intact." Despite that ruling, after the jury verdict, the trial judge still retained the Petitioners' property. The reason is explained in the pre-trial affidavits supporting the pre-trial motion to recuse (which included an affidavit of good faith from Mr. Nunez's attorney), which attested to the manifest bias and prejudice of the trial judge against the Petitioners in the interpleader action. The Petitioners have successfully documented and exposed the *ex parte* meeting between the judge and one of the parties to the litigation during the proceedings (even though, as the underlying record proves, the trial judge, until confronted with the irrefutable proof to the contrary, had firmly denied from the bench, in open court, that the *ex parte* meeting had ever occurred).

signed affidavits and/or testified under the pains and penalties perjury attesting that all of the settling parties agreed to the Petitioners' allotments, which at the time of the settlement, was 2 million dollars.

- Moreover, Mr. Nunez has also admitted under the pains and penalties of perjury that the Petitioners never had an agreement with him that they would pay his judgment in favor of the law firms. The Petitioners are only responsible for the payment of their own judgments, and not those of any other party.

- The Respondents correctly pointed out that:

    1. "Both the single justice and the appellate panel treated the Picciottos' petition as raising a question of discretionary relief;

    2. "Neither [courts] dealt with the constitutional issues that the Picciottos ask this Court to review.";

    3. "Noticeably absent form the trial court's ruling and from the brief memorandum opinion of the Appeals court is any discussion of the constitutional issues that the Petitioners seek to bring before this court."

The Respondents neglect to tell this Court, however, that the Petitioners had specifically pled in the petitions and in their appeals to the state courts that their

fundamental property rights and the guarantees provided to every American by Article XIV of the United States Constitution were being violated, but the state courts simply chose to ignore the constitutional arguments outlined in those pleadings, and declined to grant any relief. The Massachusetts courts turn their backs to the premise that a deprivation of property, even if temporary, is unconstitutional. That caused the Petitioners to petition the United States Supreme Court through the present writ.

None of the lower court's transgressions raised an eyebrow with the higher courts, thus it is no surprise that in Massachusetts, lower courts feel free to:

a) Allow jurors to come to court dressed in Halloween costumes;

b) Allow parties representing attorney lienholders to pass candies and memorabilia to the jury;

c) Remove the American flag when sworn testimony is to be provided to the jury;

d) Allow the circulation of a suggested cast list of who should play whom in the movie of the circus-like atmosphere.

Despite what the attorneys wanted in regard to the jurors, the Petitioners never authorized the conduct, and no defendant should be subjected to it. The Petitioners are of the opinion that such a trial constitutes an unfair tribunal, and the dismissal of their lawsuit by such an unfair tribunal (which occurred through the judge's second *de facto* seizure of the Petitioners' case absent the

required procedure), violated due process and the Fourteenth Amendment of the United States Constitution which guarantees every American citizen a fair trial before a fair tribunal; *In Re: Murchison*, 349 U.S. 133, 136 (1955). The Massachusetts higher courts, including Chief Justice Marshall, who assures the public that our state courts are vigilant in providing litigants with a tribunal that is as "fair as the lot of humanity will permit," refused to address the Petitioners' argument that the judge who dismissed their lawsuit obviously constituted an unfair tribunal

## CONCLUSION

The Respondents try to convince this Court that the Petitioners have no right to be before this Court as the appeal of the interpleader action is still pending in the Massachusetts Courts, and the relief that the Appellants were seeking from the state courts is simply "discretionary." That is not so. The Appellants were seeking to either have their lawsuit reinstated or to have their property released to them. The Petitioners were requesting that the Massachusetts courts either release their property to them, or, at the very least, allow them to have their day in court. The Massachusetts courts refused to do either one. Therefore, this case falls within the provision of 28 U.S.C. 1257. The Petitioners pray that his Honorable Court will grant them their writ.

Melita Picciotto
418 Lafayette Street
Salem, Massachusetts
(978) 741-0218

Athena Picciotto
418 Lafayette street
Salem, Massachusetts
(978) 741-0218

# SUPPLEMENTAL APPENDIX

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT DEPT.
C.A. 99-1594A

Albert P. Zabin, Esq., et als
Plaintiffs
v.
Stefano Picciotto,
Defendants

## JUDGMENT OF DISMISSAL OF THE CLAIM OF ATTORNEY GEORGE E. RICHARDSON

## JUDGMENT

1. In accordance with the Ruling of Dismissal of the Remaining Claim of Attorney George E. Richardson (dated May 28, 2002) and docketed on June 3, 2002, as Entry 542), Judgment of Dismissal hereby enters upon the remaining claim of the plaintiff George E. Richardson.

2. While the Ruling of Dismissal of Entry 542 had the intended character of an appealable final order within the meaning of Mass. R.A.P. 3 and 4, the present judgment shall become the operative final entry for purpose of appeal.

_____
Mitchell J. Sikora, Jr.
Justice of the Superior Court
DATED: March 20, 2003

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT DEPT.
C.A. 99-1594A

Albert P. Zabin, Esq., et als
Plaintiffs
v.
Stefano Picciotto,
Defendants

# ORDER FOR THE DISTRIBUTION OF ESCROW FUNDS FOR PAYMENT OF THE JUDGMENTS OF THE GILLERAN PARTIES

## ORDER

1. Pursuant to the Allowance of the Joint Motion of Juan Nunez and the Gilleran Parties for Disbursement of Escrow Funds to Pay Judgments of the Gilleran Parties (Docketed Paper 705 dated June 14, 2004;notice sent June 15, 2004) in the absence of any intervening appellate action and direction; the court hereby authorizes and directs the Clerk Magistrate of the Suffolk Superior Court to release from the escrow fund the following amount to the specified parties:

The sum of One million Seven Hundred Eighty-Two Thousand Seven Hundred Thirty-One Dollars and Sixty-Five Cents ($1,782,731.65) as the entitlement of the Gilleran Parties inclusive of compensatory damages, prejudgment interest, post judgment interest, and costs, through July 15, 2004.

2. The Clerk Magistrate shall make the check in that amount payable to "Pepe & Hazard, LLP." That firm shall receive the payment in its capacity as counsel and agent for the Gilleran Parties.

3. Attorney Edward S. Cheng shall receive delivery of the check and shall furnish the Clerk Magistrate a receipt for the payment.

Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: July 16, 2004

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT DEPT.
C.A. 99-1594A

Albert P. Zabin, Esq., et als
Plaintiffs
v.
Stefano Picciotto,
Defendants

# SUPPLEMENTAL ORDER FOR THE DISTRIBUTION OF ESCROW FUNDS FOR PAYMENT OF THE JUDGMENTS OF THE GILLERAN PARTIES

## ORDER

1. Pursuant to the Allowance of the Joint Motion of Juan Nunez and the Gilleran Parties for Disbursement of Escrow Funds to Pay Judgments of The Gilleran Parities (Docket Paper 705 dated June 14, 2004; notice sent on June 15, 2004); in the absence of any opposition to the motion and the Allowance; and in the absence of any intervening appellate action and direction; the court hereby authorizes and directs the Clerk Magistrate of the Suffolk Superior Court to release from the escrow fund the following amount to the specific parties:

The sum of Sixty-Nine Thousand Five Hundred Dollars and Twenty-Two Cents ($69,505.22) as a supplemental entitlement of the Gilleran parties inclusive of compensatory damages from Melita Picciotto and Athena Picciotto, related prejudgment and post judgment

interest, and apportioned joint costs through July 15, 2004.

2. The Clerk Magistrate shall make a supplemental check in that amount payable to "Pepe & Hazard, LLP," That firm shall receive the payment in its capacity as counsel and agent for the Gilleran parties.

3. Attorney Edward S. Cheng shall receive delivery of the check and shall furnish the Clerk Magistrate a receipt for the payment.

_____

Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: July 16, 2004

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT DEPT.
C.A. 99-1594A

Albert P. Zabin, Esq., et als
Plaintiffs
v.
Stefano Picciotto,
Defendants

RULING UPON THE MOTION IN BEHALF OF ATHENA PICCIOTTO FOR RLEASE OF FUNDS

RULING

Upon consideration of all motion and opposition materials and of oral argument, the court denies the present motion (Docket entry 383) for the release of $446,050.67 from escrow and specifically to Athena Picciotto.

REASONING

1. The present motion rests upon the argument that Athena Picciotto has a specific distinguishable interest in the court-managed escrow fund. The Picciotto parties reason that they have formed an internal agreement for the allocation of the Travelers settlement amount; and that Athena's share under that intramural arrangement now comes to $445, 050.87 (after some adjustments to their original allocation of $500,000).

2. The internal agreement among the entire Picciotto parties (comprised of Stefano Judith, Athena Melita, Foreign Car Center, Inc., and Juan Nunez) binds them, but not any non-parties to their agreement, and not the court. If the Picciotto parties were to request an undifferentiated distribution form the escrow fund, the court would entertain it.

_____

Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: 10/9/2001